

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ANTHONY CROSS,  
                     Plaintiff,  
             vs.  
 RON JAEGER, et al.,  
                     Defendants.

3:13-cv-00433-MMD-WGC

**ORDER**

**Re: Doc. # 162**

Before the court is Plaintiff's "Motion for Sanctions Due to the Spoliation of Evidence." (Doc. # 162<sup>1</sup>). Defendant has responded (Doc. # 167) and Plaintiff has replied (Doc. # 180).

**I. BACKGROUND**

The subject of Plaintiff's motion pertains to an emergency grievance which Plaintiff contends was not retained by Defendant Jaeger nor entered by Defendant Jaeger into the Nevada Department of Corrections (NDOC) NOTIS computer system. Plaintiff seeks sanctions by reason of Defendant's failure to save or file the grievance or to enter it into the NOTIS system.

While Defendant does not dispute the grievance was not entered into NOTIS, the grievance has been produced by Plaintiff and is part of the Plaintiff's complaint. Defendant Jaeger admits that the signature on Plaintiff's copy of the emergency grievance is his (Jaeger's). Doc # 167 at 2.) Defendant also notes that the grievance was submitted in September 2011 but that Plaintiff's legal action was not commenced until some two years later, August 12, 2013. (Doc. # 1.) Thus, Defendant Jaeger argues he would not have had knowledge of the relevance of any grievance to Plaintiff's litigation. Defendant last argues there is no "adverse inference" which should be imposed because the document exists and he

---

<sup>1</sup> Refers to court's docket number.

admits its authenticity.

## II. DISCUSSION

The issue of sanctions for spoliation of evidence by reason of a party's failure to preserve relevant evidence was cogently addressed by Magistrate Judge George W. Foley in *Anderson v. Wal-Mart Stores, Inc.*, No. 2:10-cv-02235-GMN-GWF, 2012 WL 300878 (Feb. 1, 2012). Judge Foley stated:

[T]he court has the inherent authority to impose sanctions based on a party's failure to preserve relevant evidence. Sanctions may be imposed if the party was on notice that the evidence was potentially relevant to pending or reasonably foreseeable litigation and failed to take reasonable steps to preserve it. *United States v. \$40,955.00 In U.S. Currency*, 554 F.3d 752, 758 (9th Cir.2009); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir.2006); and *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.1992). *See also Anderson v. Wal-Mart Stores, Inc.*, 2011 WL 4621286, at \*3-\*4 (D.Nev. 2011). The forms of sanction may include (1) an instruction to the jury that it may draw an inference adverse to the party or witness responsible for destroying the evidence, (2) an order excluding witness testimony proffered by the party responsible for destroying the evidence, or (3) a dispositive order dismissing the complaint or entering a default judgment. *In re Napster*, 462 F.Supp.2d 1060, 1066 (N.D.Cal.2006). *See also Powell v. Texvans, Inc.*, 2011 WL 1099120, \*4 (D.Nev.2011) and *Morford v. Wal-Mart Stores, Inc.*, 2011 WL 635220, \*3 (D.Nev.2011). While a finding of bad faith is not required for the imposition of sanctions, "a party's motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed." *In re Napster*, 464 F.Supp.2d at 1066–67, citing *Baliotis v. McNeil*, 870 F.Supp. 1285, 1291 (M.D.Pa.1994). Courts should choose "the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim." *Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3rd Cir.1994); *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Cir.1993). *See also Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006).

*Id.*, at \*2.

Although, as Judge Foley noted in *Wal-Mart*, "bad faith or motive" is not necessarily determinative in a spoliation claim, the timing of Defendant Jaeger's failure to preserve the NDOC copy of the grievance or his not entering it into NOTIS does not give rise to any suggestion of an adverse motive or bad faith on Jaeger's behalf, at least insofar as this litigation is concerned..

Plaintiff argues Defendant failed to comply with NDOC procedures for not entering the grievance into NOTIS. Plaintiff may make this argument at trial. While the facts surrounding the filing and retention of this grievance might be subject to question, there is no evidence of the "willfulness of the destructive act." It is not an appropriate basis for sanctions for spoliation of a document, a copy of which survives and the authenticity of which has been verified by the Defendant. (Doc. # 167 at 2.) Failing to

1 follow NDOC procedures is not a basis for spoliation sanctions.

2 Last, because Plaintiff has a copy of the grievance, the court cannot discern any prejudice to  
3 Plaintiff insofar as this litigation is concerned.

4 The burden is on the movant of establishing the element of a spoliation claim. *Centrifugal*  
5 *Force, Inc. v. Softnet Communications, Inc.*, 783 F. Supp.2d 736, 740 (S.D. N.Y. 2011); *Reinsdorf v.*  
6 *Skechers, USA*, 296 F.R.D. 604, 626 (C.D. Cal. 2013). Plaintiff has not carried his burden in this matter.

7 Plaintiff's motion (Doc. # 162) is **DENIED**.

8 IT IS SO ORDERED.

9 DATED: June 17, 2015.

10   
11 WILLIAM G. COBB  
12 UNITED STATES MAGISTRATE JUDGE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28